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No. 93-1767

In the Supreme Court of the United States

OCTOBER TERM, 1994

FRANK ATONIO, ET AL., PETITIONERS

v.

WARDS COVE PACKING COMPANY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether Sections 104 and 105 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 which modify the standards for proving Title VII disparate impact claims, apply to cases pending on the Act's effective date.

2. Whether Section 402(b) of the Act, Pub. L. No. 102-166, 105 Stat. 1099, which exempts the present case from the Act's coverage, violates Article III or the equal protection component of the Due Process Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A43) is reported at 10 F.3d 1485. The opinion of the district court (Pet. App. A218-A232) is unreported. This Court's previous opinion is reported at 490 U.S. 642. Previous opinions of the court of appeals are reported at 827 F.2d 439 (Pet. App. A44-A65), 810 F.2d 1477 (Pet. App. A66-A107), 768 F.2d 1120 (Pet. App. A110-A138), and 703 F.2d 329 (Pet. App. A139-A145). The district court's initial decision (Pet. App. A146-A214) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1993. A petition for rehearing was denied on January 31, 1994. Pet. App. A237-A238. The petition for

a writ of certiorari was filed on May 2, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1974, petitioners, who are nonwhite cannery workers, filed suit against several Alaskan cannery companies. Petitioners alleged that the companies had engaged in various practices that discriminated against nonwhite workers in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* Pet. App. A3. In particular, petitioners alleged that the companies had engaged in nepotism in filling the better-paying jobs, had failed to inform nonwhite workers about openings in those jobs, had segregated workers in housing and messing facilities, and had engaged in race-labelling of jobs and housing. *Id.* at A4.

In 1983, the district court entered judgment against petitioners. The district court rejected petitioners' disparate treatment claims, and those claims are no longer at issue. The district court also rejected petitioners' disparate impact claims. It rejected some of those claims for failure of proof and others because it determined that subjective practices could not be challenged under a disparate impact theory. Pet. App. A4-A5.[1]

A panel of the court of appeals affirmed, but the Ninth Circuit ordered rehearing *en banc.* The *en banc* court held that subjective practices could be analyzed under a disparate impact theory and remanded the case to the panel.

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[1] Subjective practices are decisions based on the exercise of an employer's personal judgment or the application of inherently subjective criteria.

The panel then held that petitioners had established a prima facie case of disparate impact and remanded for consideration of the question of business necessity. Pet. App. A5-A6.

This Court affirmed the court of appeals' holding that subjective practices could be challenged under a disparate impact theory. It held, however, that petitioners had failed to establish a prima facie case. This Court also addressed two other issues relating to disparate impact cases. First, it held that plaintiffs who challenge one or more practices on a disparate impact theory have the burden of showing that each practice they challenge has a significant disparate impact. Second, it held that, should plaintiffs make such a showing, employers then have the burden of producing evidence that the practice significantly serves legitimate business goals. This Court remanded to the court of appeals, which in turn remanded to the district court. Pet. App. A6-A7.

On remand, the district court once again entered judgment for the companies. It found that petitioners had failed to show that any of the practices they had challenged had a disparate impact. The district court also determined that the companies had shown that their housing and messing practices served legitimate business goals. Pet. App. A7.

2. While petitioners' appeal was pending, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. In direct response to this Court's decision in this case, Sections 104 and 105 of the Act altered the standards for proving disparate impact claims. Section 105 permits a plaintiff to challenge an employer's decision-making process as a single employment practice causing a disparate impact when the elements of that process are "not capable of separation for analysis." 105 Stat. 1074 42

U.S.C. 2000e-2(k)(1)(B)(i) (Supp. IV 1992). Section 105 also places upon the employer the burden to "demonstrate" that a practice causing a disparate impact is "job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k)(1)(A)(i) (Supp. IV 1992). Under Section 104, the term "demonstrate[ ]" means "meets the burdens of production and persuasion." 42 U.S.C. 2000e(m) (Supp. IV 1992).

Section 402(b) of the Act provides, however, that

> [n]otwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

105 Stat. 1099, *reprinted in* 42 U.S.C. 1981, note (Supp. IV 1992). That provision was intended to exempt this case (and only this case) from the provisions in the Act. Pet. App. A8-A9 & n.3.

Petitioners urged the court of appeals to apply the standards established by the 1991 Act to this case and to reject as unconstitutional the exemption set forth in Section 402(b). Pet. App. A9. The United States intervened to defend the constitutionality of Section 402(b).

3. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. A1-A43. The court noted that prior circuit precedent had held that the 1991 Act was retroactive, and it concluded that "this appeal can be resolved without further delay by treating the Act as retroactive." *Id.* at A10.

The court then upheld the constitutionality of Section 402(b). The court first considered petitioners' contention that Section 402(b) violates Article III under this Court's decision in *United States* v. *Klein,* 80 U.S. (13 Wall.) 128, 146 (1872), because it reflects "an attempt by Congress to

legislate an end to this litigation." Pet. App. A11. The court concluded that Section 402(b) does not "present[ ] a genuine *Klein* issue." Pet. App. 22a. The court explained that "[t]he provision does not purport to order any federal court to dismiss the workers' complaint, to enter judgment against them, or to make particular findings of fact or conclusions of law." *Ibid.* Instead, "the judiciary remains free to decide this case and every issue in it by the same principles and law that prevailed prior to the passage of the 1991 Act." *Ibid.*

The court further concluded that *Robertson* v. *Seattle Audubon Society,* 112 S. Ct. 1407 (1992), was "fatal" to petitioners' Article III claim. Pet. App. A11. In *Robertson,* this Court rejected an Article III challenge to a statute that directed the courts to resolve two pending cases in accordance with two new statutory standards. The court of appeals concluded that "[i]f the amendment in *Robertson* avoided separation of powers pitfalls, section 402(b) clearly does so as well." Pet. App. A12.

The court also rejected petitioners' contention that Section 402(b) violates the equal protection component of the Fifth Amendment Due Process Clause. Because the statute is "targeted at a particular case, and not at a racial class or other category subject to special constitutional protection," the court held that the statute was subject to rational basis review. Pet. App. A13. Applying that test, the court noted the government's argument that Congress was aware that this case had "consumed enormous time and resources," that this Court's decision had "provided clear-cut legal standards with which to resolve the matter," and that Congress therefore could rationally have concluded that "it did not wish to retroactively inject [new statutory provisions] into this lawsuit." *Id.* at A14. The court concluded that, "[u]nder the minimum standard of

rationality, the reason proffered by the Government qualifies as plausible and sufficient." *Id.* at A15. The court added that although there is "something jarring about legislation that is aimed at an individual target," the judiciary "generally lack[s] authority to invalidate a public law under the rational basis test merely because that law narrowly targets one or a few individuals." *Id.* at A15-A16 (citing cases).

Turning to the merits of petitioners' Title VII claims, the court found that petitioners had failed to show that subjective practices or nepotism had caused a disparate impact. Pet. App. A26-A32. The court held, however, that the district court did not give sufficient consideration to petitioners' claims that separate hiring channels deterred nonwhite workers from applying for better-paying jobs, that the companies could satisfy their business needs without relying on practices that resulted in segregated housing, and that the practice of race-labelling created a discriminatory work environment. *Id.* at A33-A41. The court remanded for consideration of those claims.

ARGUMENT

1. Petitioners contend that Section 402(b) singles out their case for unfavorable treatment in violation of the equal protection component of the Due Process Clause. Pet. 23-26. One of the general characteristics of legislation is that it applies to categories of persons, rather than to a particular individual or entity. Categorical legislation provides a significant degree of protection against arbitrary or irrational governmental action. As this Court recently reiterated, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would im-

pose upon a minority must be imposed generally." *Madsen* v. *Women's Health Center, Inc.*, 114 S. Ct. 2516, 2524 (1994) (quoting *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112-113 (1949)).

Congress, of course, has wide latitude to decide to what extent new legislation should apply to pending cases. And it has considerable discretion to draw general distinctions that may arguably be unfair or unwise. *FCC* v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993).

Section 402(b) is framed in categorical terms. On its face, the exemption applies to "any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." The filing date requirement in the provision suggests a purpose to reach the category of disparate impact cases that have been in litigation longest. The requirement of a date of first decision after October 30, 1983, however, is inexplicable except as an effort to capture this case and no other.

Legislation giving favored treatment to a single person or entity is not unprecedented. Tax exemptions sometimes take that form. And there is a long history of private bills of that character. See *Central States Pension Fund* v. *Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1342-1343 (7th Cir. 1992). In those contexts, however, a single person or entity receives a benefit, and the burden of that favored treatment is borne by the public at-large. In contrast, the entire weight of the favored treatment for Wards Cove Packing Co. falls on a single group of minority workers who are the plaintiffs in this case.

In rejecting petitioners' constitutional challenge, the court of appeals relied primarily on this Court's decision in *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976). That case involved a challenge to a local ordinance banning pushcarts from the French Quarter, but exempting push-

cart vendors who had continuously operated for eight years or more. Even though only two vendors fell within the exemption, this Court upheld its constitutionality. As the Court stressed in its opinion, however, that ordinance was "solely an economic regulation." *Id.* at 303. In addition, the exemption in *Dukes* readily could be understood on its face as an effort to protect the category of vendors who were most likely to have built up substantial reliance interests. *Id.* at 305. Those disadvantaged by the *Dukes* ordinance, moreover, included all other pushcart operators. To provide the plaintiffs in one pending case with significantly less protection against discrimination in the workplace than the plaintiffs in any other pending case poses questions that were not fully addressed or answered by *Dukes.*[2]

2. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [a court] ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U.S. 101, 105 (1944). That principle is applicable here. Petitioners' constitutional claim arises only if Sections 104 and 105 apply to pending cases. If they do not, then, as the court of appeals recognized, petitioners "cannot benefit from [them] in any event, and section 402(b) becomes superfluous." Pet. App. A9.

Understanding that a decision on the retroactivity of Sections 104 and 105 might remove the constitutional issue from the case, the court of appeals addressed that statutory question first. The court noted that its previous decision in *Estate of Reynolds* v. *Martin,* 985 F.2d 470 (9th Cir. 1993), had held the entire 1991 Act retroactive. It

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[2] For the reasons given by the court of appeals (Pet. App. A11-A13), Section 402(b) does not raise a serious Article III question.

therefore followed circuit precedent and treated Sections 104 and 105 as retroactive, necessitating a decision on the constitutionality of Section 402(b). Pet. App. A9-A10.

After the court of appeals issued its decision in this case, this Court issued its decision in *Landgraf* v. *USI Film Products,* 114 S. Ct. 1483 (1994). In *Landgraf,* the Court squarely rejected the premise of the *Martin* decision that the text of the 1991 Act required that it be applied to pending cases. 114 S. Ct. at 1493-1496. The Court held instead that each provision of the Act must be examined separately to decide whether it applies to pending cases. *Id.* at 1505. The Court also established general principles for resolving that issue. *Id.* at 1497-1505. Neither *Landgraf* nor the companion case of *Rivers* v. *Roadway Express, Inc.,* 114 S. Ct. 1510 (1994), decided whether Sections 104 and 105 apply to pending cases. That issue is therefore an open one.

Given the importance of the principle that constitutional questions should be avoided, if possible, we suggest that this court vacate the decision of the court of appeals and remand the case for that court's reconsideration of the question whether Sections 104 and 105 apply to pending cases in light of *Landgraf* and *Rivers.* Should it ultimately be concluded that Sections 104 and 105 do not apply to pending cases, it would obviate the need to decide whether Section 402(b) is constitutional.

Petitioners urge that this Court itself initially resolve the question whether Sections 104 and 105 apply to pending cases. Pet. 15-17. Such review would be premature. Not only has the court below not yet addressed that question in light of *Landgraf* and *Rivers,* the issue has also not been considered by any other court of appeals. This Court should not address a question of that nature in the first instance. Prior lower court consideration will illuminate the issues and, if no conflict of decisions arises, may make this Court's review unnecessary.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision below vacated, and the case remanded for reconsideration in light of *Landgraf* and *Rivers*.

Respectfully submitted.

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